IN THE HIGH COURT OF JUSTICE, HELD IN SOGAKOPE ON MONDAY THE 14TH DAY OF NOVEMBER, 2022 BEFORE HER LADYSHIP JUSTICE DOREEN G. BOAKYE-AGYEI (MRS.) JUSTICE OF THE HIGH COURT

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SUIT NO: F22/08/2022

DANIEL KUATUSAH - APPLICANT

VS

REPUBLIC - RESPONDENT

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PARTIES:

APPELLANT PRESENT

COUNSEL:

MR. SENANU AFAGBE, ESQ., COUNSEL FOR APPELLANT - PRESENT.

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JUDGMENT

INTRODUCTION

This is an appeal by the Appellant against the Ruling of the Circuit Court Sogakope presided over by His Honour Isaac Addo, Esq. overruling the Appellants' submission of No case to answer. The Notice of Appeal by virtue of which the present appeal has been brought can be found at page 166 of the Record of Appeal hereinafter referred to as the "ROA". The Notice of Appeal sets out two (2) main grounds of appeal namely:

a. That the Prosecution failed to make a prima facie case against the Petitioner/Appellant to warrant the Petitioner/Appellant to open his defence.

b. That the Ruling/Order of the trial Circuit Court cannot be supported by the evidence on record.

c. Additional grounds of appeal may be filed upon receipt of the Record of proceedings.

THE FACTS

The victim (PW 1) in this case is a form one student at Akatsi Roman Catholic Basic School. The facts have it that on 27/02/2020 at about 3:00 pm, the Appellant invited the victim through a witness in the case and asked her to send his note book to his house. The Appellant hired a motor bike for the victim to ride her to his house. That the Appellant called his girlfriend also a witness (PW 3) to give her key to the victim to place his books in her room. That the Appellant traced the victim on another motor bike to the house and forcibly had sexual intercourse with the victim in the girlfriend's room. After the act, the Appellant hired another motor bike for victim to be sent back to the school. The victim who sustained injury and had blood stains on her pants reported her ordeal to the grandmother and showed her torn underwear and pants stained with blood. The Appellant was subsequently arrested based on the above stated allegations.

Per the facts, during investigations, it came to light that Appellant called witness (PW 3) and asked her to delete his contact numbers from her phone which witness agreed and did same. The Appellant denied that he ever knew the witness in his Caution Statement. The witness was then also arrested and she corroborated the Appellant's statement. The facts also have it that the witness was granted bail and the next day morning, witness reported at the station with her father and confessed to Police that the Appellant is her boyfriend and that on the day of the incident, the Appellant called her whilst she was at Akatsi market trading and demanded for her room key to relax in her room whereupon she rushed home and handed her key to the victim and went back. According to the

witness, later in the day, the Appellant called her to delete her contact numbers from her phone to deceive the Police investigation. After the investigation, Accused was charged with the offence per page 2 of the ROA.

THE APPLICABLE LAWS

The Criminal Offences Act, 1960 (Act 29) in section 101 provides as follows;

a) For the purposes of this Act defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age.

b) A person who naturally or unnaturally knows a child under sixteen years of age, whether with or without the consent of the child, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years.

Section 11 (2) of the Evidence Act, NRCD 323 provides that:

"In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of fact beyond reasonable doubt"

Article 19 (2) (c) of the 1992 Constitution provides that;

"A person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.

Submission of No Case is a practice that has crystallized out of Section 173 of Act 30 (in Summary Trials). The said Section 173 of Act 30 states:

> *"Where at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused sufficiently to require him to make a defence, the court shall, as to that particular charge, acquit accused."*

This provision was judicially interpreted in the well-known locus classicus case of **STATE V. ALI KASSENA 119621GLR 44 SC,** where, it was held at page 148 that;

"A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.

Apart from these two situations, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it."

The law is well-settled that the standard of proof required at the close of Prosecution's case is prima facie evidence.

In the case of **THE STATE V ANNAN [1965] GLR 600 AT 603,** His Lordship, Hayfron-Benjamin J. (as he then was) stated:

> *"It seems to me therefore that a submission of no case ought to be upheld in trials on indictment if the judge is of the view that the evidence adduced will not reasonably satisfy a jury, and this I think will be the case first, when the prosecution has not led any evidence to prove an essential element or ingredient in the offence charged and secondly, where the evidence adduced in support of the prosecution's case has been so discredited as a result of cross- examination, or is so contradictory, or is so manifestly unreliable that no reasonable tribunal or jury could safely convict upon it").*

In the case of **TSATSU TSIKATA V. THE REPUBLIC [2003-2004] SCGLR 1068**, the Court laid down four grounds on which Submission of No case may be made and upheld. These are where;

i. The prosecution failed to prove an essential element of the offence; or

ii. The witnesses called by the prosecution were discredited by the accused through cross-examination or;

ii. The evidence adduced by the prosecution is so manifestly unreliable that no court of law could safely convict upon that evidence or;

iii. The evidence adduced by the prosecution is evenly balanced, that is the evidence on record is susceptible to two likely explanations and while one is consistent with guilt the other is consistent with innocence.

It was held at Holding 5 that;

"On a submission of no case, the judge's function was essentially to determine whether there was a genuine case for trial i.e. whether there were any genuine factual issues that could properly be resolved only by a finder of fact because they might reasonably be resolved in favour of either party. The enquiry had to focus on the threshold question whether the evidence presented sufficient disagreement to require a full trial, or whether it was so one-sided that one party must prevail as a matter of law. Therefore, where reasonable minds differ as to the import of the evidence presented in a submission of no case, that motion should not be upheld. If on the other hand, there could be but one and only one reasonable conclusion favouring the moving party, even assuming the truth of all the prosecution had to say, the judge must grant the motion. Where the submission was rejected and the case went to trial, it was then that the judge or jury as appropriate, being the trier of facts, would be called upon to determine whether or not the guilt of the accused had been proved beyond reasonable doubt. In this instant case, it was very difficult for anyone who had studied the record of the case against the Appellant in the trial High Court and the Court of Appeal to conclude that there was no evidence upon which the trial judge or jury could hang either of the two possible results: a reasonable doubt or no reasonable doubt. Whether satisfactory evidence had been led on all the essential elements of all the crimes charged, was an open matter at that point."

In the candid opinion of the Court is clear from the above authorities that the trial court is not expected to do anything beyond a determination of whether or not a prima facie case has been made against the Appellant. Prima facie evidence is evidence, which on its face or first appearance, without more, could lead to conviction if the accused fails to give a reasonable explanation to rebut it. It is evidence that the Prosecution is obliged to lead if it hopes to secure conviction of the person charged. In doing so, the trial court has to consider;

a. Whether or not the evidence so far adduced has been so discredited as a result of cross examination that it would be unreasonable to continue with the trial, or

b. Whether an essential ingredient or element of the charges against the Appellant has not been established by the evidence so far adduced.

CONCLUSION OF THE CIRCUIT COURT

The Ruling of the lower Court against which this Appeal has been brought is dated 22nd April, 2022 and can be found at pages 152 to 165 of the ROA. In its Ruling the lower Court overruled the Appellant's Submission of No Case to answer. The Trial Court justified its decision by stating as follows;

> *"In the humble view of this court and having regard to the evidence adduced at this stage of the trial, the prosecution has made out a prima facie case against the Accused Person, and he is accordingly called upon to open/ enter his defence. In the circumstances, the written submission of no case to answer filed by the defence counsel on behalf of the accused person is overruled" (see page 165 of the ROA).*

THE GROUNDS OF APPEAL

The grounds of appeal in the Notice of Appeal are as follows;

a. That the prosecution failed to make a prima face case against the Petitioner/Appellant to warrant the Petitioner/Appellant to open his defence.

b. That the Ruling/Order of the trial Circuit Court cannot be supported by the evidence on record.

c. Additional grounds of appeal may be filed upon receipt of the Record of proceedings.

The Notice of Appeal can be found at pages 166 of the ROA. Although the Notice of Appeal indicates that the Appellant intended to file additional ground(s) of appeal upon receipt of the record, the Appellant has not filed any such additional ground(s). Both grounds 1 and 2 of appeal relate to the evaluation of the evidence on record.

It is the case of the Appellant that the Learned Trial Judge's conclusion in overruling the Appellant's Submission of No Case to answer was not borne out of the overwhelming evidence on record. His Counsel submits also that there is strong basis for this Court to interfere and overturn the Ruling of the Learned Judge which is clearly not supported by the evidence on record.

It is trite law that an Appeal is by way of re-hearing and that this Honourable Court ought to look at and evaluate the evidence adduced at the Trial Court, so as to satisfy itself that the conclusions reached by the Learned Judge are well founded. In the case of **KINGSLEY AMANKWAH (A.K.A SPIDER) VS THE REPUBLIC [2021] DLSC 10793,** the Supreme Court per Dotse JSC has laid down some guidelines or criteria that an Appellate Court will embark upon when it is rehearing a Criminal Appeal as follows;

i. In considering an appeal as one of re-hearing, the appellate court must undertake a holistic evaluation of the entire record of appeal.

ii. This evaluation must commence with a consideration of the charge sheet with which the Appellant was charged and prosecuted at the trial court. This must involve an evaluation of the facts of the case relative to the charges preferred against the Appellant.

iii. This also involves an assessment of the statutes under which the charges have been laid against the appellant(s) and an evaluation of whether these are appropriate vis-à-vis the facts of the case.

iv. An evaluation of the various ingredients of the offences preferred against the Appellant(s) and the evidence led at the trial court. This is to ensure that the evidence led at the trial court has established the key ingredients of the offence or offences preferred against the Appellant.

v. There must be an assessment of the entire trial to ensure that all the witnesses called by the prosecution lead evidence according to the tenets of the Evidence Act, 1975, NRCD 323.

vi. Ensure that the entire trial conforms to the rules of natural justice.

vii. An evaluation of all exhibits tendered during the trial, documentary or otherwise to ensure their relevance to the trial and in support of the substance of the offence charged and applicable evidence.

viii. A duty to evaluate the application of the facts of the case, the law and the evidence led at the trial vis-à-vis the decision that the court has given".

What then is the evidence led at the trial on record? The Prosecution called four (4) witnesses in all. The 4th Prosecution Witness was the Police Investigator. The pertinent question to ask is whether the Prosecution led any cogent, credible and reliable evidence to establish the fact that someone has had sexual intercourse with the victim (PW 1) and that person was the Appellant. The Court is mandated to examine the evidence on record to come to a conclusion one way or the other.

To succeed in the case of defilement, the Prosecution must establish or prove each of the following essential elements listed as follows;

i. That the victim is a girl under sixteen years of age.

ii. That someone has had sexual intercourse with the victim; and

iii. That person is the accused.

EVIDENCE LED BY THE PROSECUTION

a. Evidence of PW 1

PW 1 in her witness statement found at page 11 of the ROA filed on the 31/03/2020 which was adopted by the Court testified that on the 27/02/2020 at about 2:00 pm whilst at school, Appellant sent her to buy him bread with aliha which she did. She said that about 30 minutes later, the Appellant sent one of the students to call her for him which she went. She said that the Appellant gave his note book to be sent to his house and that as she doesn't know his house, he hired the services of a motor rider who knows his house for him to send her. Her case was that the Appellant informed her that when she gets to his house, she will meet a lady who will give her his key to enable her have access to the room. PW 1 continued that when she got to the house, she met a lady who gave her the key and pointed her to the room. She said she opened the door, entered the room and placed the books on the table and that as she was about to close the door, the Appellant came in with his motorbike and met her at the entrance. She said that he asked her to wait and that he gave her a seat to sit in the room and pretended to be searching for something in a fertilizer bag close by. She testified that not quite long after that, the Appellant said they should leave.

PW 1 testified that as she stood up, the Appellant pushed her from behind onto the bed and she started shouting and he picked a piece of cloth near the fertilizer bag and tied her mouth with it. She said that the Appellant removed his trousers and was left in his boxer shorts, he raised her school uniform upwards and wanted to remove her pants. She claimed that she held the pants preventing him from removing it and that it turned into a struggle between them. PW 1 said that the Appellant finally overpowered her and tore her pants and underwear and pulled his boxer shorts down and inserted his penis into

her vagina and forcibly had sexual intercourse with her. PW 1 testified further that she was feeling so much pain and could not shout any longer since her mouth was tied and that after the act, she saw blood oozing out from her vagina which got her pants stained after she wore it. She further testified that the Appellant threatened her not to tell anyone or else he will maltreat her at school or kill her. She testified that the Appellant hired another motor bike for her which sent her back to the school. She said that when she got to the house she could not walk due to the pain and her grandmother noticed the changes in her walking whereupon she confronted her and she narrated the ordeal she went through to her.

b. Evidence of PW 2

PW 2's (grandmother of PW 1) evidence as contained in her witness statement found at page 12 of the ROA was largely what she claimed PW 1 told her was to the effect that on 27/02/2020 at about 4:00 pm to 5:00 pm, she was at the Akatsi main market trading. There she saw her granddaughter who closed from school coming towards her and that she noticed some changes in her walking. She said that when PW 1 got to her she asked her what happened to her and that PW 1 told her that she fell down at school but she did not believe her and she asked PW 1 to pack their things for them to go home since it was late. PW 2 testified further that upon reaching the house, she convinced PW 1 to tell her the truth and that she will not beat her and then she narrated to her that one of her teachers asked her to send books to his house for him. That she got to the house with the service of a motor rider and she collected the Appellant's keys from a certain lady in the house. She then entered the room and placed the books on a table. That the moment she was about to lock the door outside, the said teacher arrived with his motorbike and asked her to sit down. The teacher forcibly had sexual intercourse with her and she sustained injury at her private part prior to the change in her walking and that PW 1 then showed her pants and the torn underwear stained with blood to her. PW 2 concluded that on

28/02/2020, she went to Akatsi Police Station with PW 1 and lodged a complaint and that Police Medical Report was issued to her to send the victim to Hospital for exanimation and treatment which she did.

c. Evidence of PW 3

PW 3's testimony as contained in her witness statement found at page 13 of the ROA filed on 31/03/2020 and adopted by the trial court is to the effect that on 27/02/2020 at about 2:50 pm, she was at Akatsi main market trading when the Appellant called her on phone and demanded for her room key to relax in her room and that she rushed home and handed over the key to the victim and went back. PW 3 continued that on the same day about 6: 30 pm, from the market she went to a friend's place at Gorve-Akatsi by pass when Appellant called her on phone and asked her to delete all his contact and call details on her phone and that she insisted and asked him why but he would not say anything. However, she complied as he directed. She testified further that on 28/02/2020 at about 7:30 am, from the market, she went to her house at Sepe Clinic Area and the Appellant placed her keys under her trap door which she took and had access to her room. She said that on the same day about 10:50 am, she went to the saloon to unbraid her hair when victim came in with Police and pointed her out as the one whom she collected the room key from. She was subsequently arrested and detained to assist investigation.

She stated that on 29/02/2020, her Cautioned Statement was obtained and she denied the allegation and told Police in her Statement that she does not know the Appellant or the victim from anywhere and she was later released on Police Inquiry Bail and was warned to report at the Police Station on 2/3/2020 to continue investigation. PW 3 testified that on 30/02/2020, she confided in her father Doe Mishiwo Kingsford by telling him the whole truth she knows about this case. She said that on 02/03/2020, she reported at the Station with her father as instructed and was paraded before the District Commander and there

she confessed to him the whole truth nothing but the truth to him in the presence of her father and other Police Officers.

d. Evidence of PW 4

PW 4 was the Investigator who investigated the offence and who testified per her witness statement found at page 14 of the ROA filed on 31/03/2020 and adopted by the Court. According to PW 4, on 28/02/2020 at about 9:00 am, PW 1 with 2 torn pants accompanied by the grandmother (PW 2) came to the station and reported that on 27/02/2020, she had been defiled by her teacher, the Appellant. The torn pants were retrieved and kept for evidential purposes. PW 4 testified that on receipt of the complaint, she prepared Police Medical form and took PW 1 to Hoggar Hospital, Akatsi for examination and treatment. The form was duly endorsed and same filed up. She continued that on 28/02/2020, PW 1 led Police to Akatsi Roman Catholic Basic School and pointed out Accused to Police as the one who defiled her and he was arrested and detained to assist investigation. PW 4 testified that on 29/02/2020, she took Statement from PW 1 and PW 2 and on the 29/02/2020, Investigation Cautioned Statement was obtained from the Appellant. On 02/03/2020, Statement was obtained from PW 3 and same filed up. PW 4 continued that on 03/03/2020, PW 1 led Police together with the Appellant to the scene of the crime at Sefe Clinic Area in PW 3's room and pointed to the bed where she was defiled by the Appellant and that photographs of the scene were taken. That the Appellant was formally arrested and charged with the offence of defilement.

ISSUES FOR DETERMINATION

The main issues for determination at this stage are

i. Whether the victim (PW 1) is a girl under sixteen years of age.

ii. Whether or not someone has had sexual intercourse with the PW 1.

iii. Whether or not it was the Appellant.

There is no controversy about the age of the victim (P W 1). The evidence on record indicates that PW 1 was below 16 years of age as at the time of the alleged crime. The burden on the prosecution is to lead cogent and credible evidence to prove that someone had sexual intercourse with PW 1. Prosecution in its attempt to prove that PW 1 was defiled by someone tendered EXHIBIT C being Medical Report found at pages 20 to 23 of the ROA from Hoggar Clinic, Akatsi.

Appellant submits that the medical examination was undertaken in a private medical facility by a doctor who was not called by the Prosecution to testify in respect of his examination/findings and to be cross-examined on same. That merely tendering the medical report without calling on the doctor to testify and to be cross-examined on same rendered the medical report unreliable and same is fatal to the case of the prosecution.

From the record, the medical report indicated that on examination, blood was seen at the introitus, hymen torn at various points, vaginal wall was not examined etc. The doctor stated in the medical report that on direct questioning, patient has not attained menarche without any further scientific examination to confirm same. The doctor in the report stated as follows *"Impression - genital lacerations due to sexual assault.*

It is Appellant's case that no effort whatsoever was made by the medical doctor to examine PW 1's vagina wall for possible medical evidence of penetration. That the Report did not indicate whether the torn hymen was fresh or not and the Report or observation was not conclusive. According to Counsel who has not indicated whether he has any medical training, several factors can lead to the tearing of hymen, presence of blood in the introitus and so on. Counsel continues that there is therefore no scientific basis to conclude that patient has not reached menarch and that the medical report is sketchy and inconclusive. Counsel also submits that the doctor who conducted the examination did

not categorically state that PW 1 was indeed defiled by anyone. The doctor in the report stated as follows *"Impression - genital lacerations due to sexual assault"*. Counsel's view is that this impression of the doctor makes his report highly manifestly unreliable and less weight ought to be put on same by the Court.

PW 1 testified under cross-examination that the doctor inserted his finger into her vagina and confirmed that someone has had sex with her. This is what transpired between PW 1 and Counsel under cross-examination;

Q. What kind of examination was conducted on you?

A. The doctor inserted his fingers into my vagina, after that he confirmed that someone has had sex with me.

The Prosecution also tendered EXHIBIT D3 found at pages 31 and 32 of the ROA being a photograph of the blood stained pants of PW 1.

Appellant per his Counsel submits that no test was conducted on this blood stained pants to ascertain whether the blood found on the pants was that of the PW 1 or something else. That the Prosecution failed to prove that the blood stained pants was as a result of any sexual activity between PW 1 and someone. They submit that this makes EXHIBIT D3 also unreliable as Prosecution at the close of its case failed to prove that PW 1 was defiled by anyone. Their view is that the Prosecution has failed to adduce any cogent, credible and reliable corroborative evidence to prove this element of the offence.

The Court does not agree with this view of Appellant. The doctor in the Report clearly stated as follows *"Impression - genital lacerations due to sexual assault"* This goes to show a prima facie case has been made.

c. Whether it was the Appellant.

The task on the Prosecution is to lead evidence to prove that it was the Appellant who defiled PW 1. The Appellant in his statement to the Police tendered in evidence and marked as EXHIBITS A and B found at pages 16 to 19 of the ROA denied ever defiling PW 1. The onus is therefore on the Prosecution to adduce cogent and credible evidence to prove that the Appellant had sexual intercourse with PW 1.

It is the case of Appellant that the Medical Report (EXHIBIT C) tendered in evidence by the Prosecution did not link or connect him to the impression formed by the doctor or the offence. He says he was not examined or tested by the doctor even though he recommended that HIV test be conducted on the suspect. That therefore, there is no connection between the medical report and the Appellant and EXHIBIT C did not connect or link the Appellant to the alleged crime.

From the record, it is in evidence that the crime incident did not occur in the Appellant's house or room but in the room of PW 3. All prosecution witnesses admitted this fact. PW 3 did not see the Appellant in her room or the scene of the crime and did not give any key to her room to the Appellant. The Appellant did not give back any key to PW 3 after the alleged crime. What is on record per PW 3's testimony is circumstantial evidence which a Court can rely on in certain instances depending on its potency and credibility.

It is the case of Appellant that the Prosecution failed to lead any cogent and credible evidence to prove that the Appellant was at the scene of the alleged crime and defiled PW 1. According to Appellant, PW 3 who was not a witness of truth alleged that Appellant called her on phone at about 2:50 pm whiles at the market and demanded for her room key to relax in her room and that she rushed home and handed over the key to PW 1 and went back. That she further alleged that at about 6: 30 pm the Appellant again called her and instructed her to delete all his contact and call details on her phone. That per PW 3's itemized bill (call records) tendered in evidence without any objection and marked as **EXHIBITS 1** and 1A found at pages 69 and 70 and the cross- examination of

PW 3 it revealed that the Accused did not call PW 3 on the day of the alleged crime and demand for any key as she alleged. This is what transpired under cross-examination found at page 106 of the ROA.

Q. At **2:03 pm, you made the call** to 0547-686076

A. I cannot recall because I was at the market.

Q. **At 2:07 pm**, you again received a call from the number you called earlier.

A. I didn't check the number that called me.

Q. **At 2:14 pm**, you called the same number again.

A. I cannot recall. It's been long.

Q. From **2:14 pm**, nobody called you till 6.04 pm.

A. **I was at the market so I cannot tell who and who called and the time**.

Q. Your claim that the accused person called you at 2:50 pm is false.

A. The accused person called on that day.

Q. You also claimed that the accused person called you at 6:30 pm to delete his call details and numbers used to call you.

A. Yes My Lord.

Q. From your call records the call of the day you received on the final number started with 055 was at 6:04 pm.

A. I cannot recall the exact time and the number that called me.

Q. **Do you remember the last person who called you that day?**

A. **No My Lord**.

PW 4 under cross-examination said that PW 3 gave her the Appellant's number. This what transpired under cross- examination;

Q. **Did PW 3 give you accused person's number?**

A. **Yes My Lord** but she stated that the accused person told her to delete all the contact details after the incident. So she deleted all the call details so she couldn't recollect the exact number that called her. *See page 119 of the ROA.*

Appellant makes capital of the fact that PW 4 also admitted under cross-examination that the periods in which PW 3 alleged that the Appellant called her i.e 2:50 pm and 6:30 pm, nobody called PW 3. That PW 4 could not find the Appellant's number among the call details of PW 3. This is what transpired;

Q. From the records from **2.14 pm** when PW3 made a call to 0547-686076,

PW3 received no other call till **6:04 pm**.

A. Yes My Lord.

Q. So it cannot be true that the allegation PW 3 said that accused person called her at 2.50 pm cannot be true.

A. That is not true. PW 3 wasn't specific about the time. She said about.

Q. You also know that from 6.04 pm, PW 3 received no call at all.

A. Yes My Lord but according to the records at 6.04, PW 3 received a call. It is captured.

Is it the case that Appellant does not know PW 3 from Adam? That she is not his girlfriend or they have never been in any relationship before? PW 4 stated that Appellant used a strange number and PW 3 couldn't recollect same. This is what transpired;

Q. All the allegations made by PW 3 are completely false.

A. That is not true.

Q. Accused person never in his lifetime called PW 3.

A. That is not true.

Q. Accused person has not had contact numbers of PW 3.

A. That is false.

Q. Since he does not have the contact number of PW3, it is impossible for accused person to call PW 3.

A. That is not true My Lord.

Q. You have not put any evidence before this court to prove the allegations that accused person called PW 3 on 27/2/2020.

A. That is not true. PW 3 stated clearly that accused person called her with a strange number and she couldn't recollect same.

Q. Did you say PW 3 stated accused person called her with a strange number?

A. Yes My Lord.

Q. Look at PW 3's statement.

A. I have seen it.

Q. Which part of PW 3's statement talked about strange number?

A. She said accused person called her on the phone. That's all. Accused person called PW3. **Accused person was the boyfriend of PW 3.**

Q. Did PW 3 give you accused person's number?

A. **Yes My Lord** but she stated that the accused person told her to delete all the contact details after the incident. So she deleted all the call details so she couldn't recollect the exact number that called her. *See pages 118 and 119 of the* ROA.

When PW 4 stated categorically that Appellant was the boyfriend of PW 3 in response to a question, This Court notes that no follow-up question was put to deny this assertion however.

What Appellant finds is worthy to note is that **EXHIBIT 1 and 1A** were applied for by the Prosecution who failed and or refused to furnish the Court with same and that after several reminders by the Court, the Appellant applied for the itemized bill and the Court was furnished with same. That PW 3's numbers indicated in the Prosecution's application are **0551973849 and 0247868511** and that of the Appellant's number was **0548269490** per pages 4 to 5 of the ROA. That even if the Appellant had instructed PW 3 to delete all his call details on her phone, the said call details will never be deleted from the system of the network provider MTN.

The Court here makes a note that PW 4 on oath testified that PW 3 had said Appellant used different numbers to call her which she did not recollect. The learned trial judge at page 12 of the Ruling found at page 164 of the ROA stated as follows;

> *"It is important to note that PW3 explained to the court that later in the day when she had given the key to her room to the victim as directed by the accused person, the Accused person called her to delete all his contacts on her phone. Also, PW3 told the court she complied with that directives from the Accused Person and could not remember the contact number the Accused person called her on that fateful day even though they communicated. This situation on the part of the Accused Person as well as PW3 is not surprising at all and can always happen".*

Based on this Counsel submits that it seems that the Learned Trial Court has drawn his conclusion on the testimony of PW 3 that the Appellant called PW 3 which conclusion is not supported by the evidence on record since there is cogent and credible documentary evidence on record that showed that the Appellant never called PW 3 on the day of the alleged crime. Counsel urges on the Court to prefer and lean favourably towards documentary evidence as against the oral testimony of PW3. He cites the case of **FOSUA & ADU POKU VRS ADU POKU MENSAH [2009] SCGLR 310**, where it was held that documentary evidence should prevail over oral evidence especially if the document is proved to be authentic. He submits that EXHIBITS 1 and 1A are authentic documents coming from the right source i.e MTN the network provider which should prevail over the oral testimony of PW3.

From reading page 12 of the Ruling of the Court below, this Court cannot agree with Appellant and his Counsel that the Judge had drawn his own conclusions from his observations.

PW 3 also in her testimony stated that the Appellant is her boyfriend but according to Appellant, it turned out that the said allegation was false. That indeed, PW 3 went to her boyfriend's place on the evening of the alleged crime which boyfriend was not the Appellant herein. This is what transpired under cross-examination of PW 3; See page 28 of the record of proceedings as well as page 104 of the ROA.

Q. Who stood as surety for you when the Police granted you bail.

A. My father.

Q. I suggest to you that your father never stood surety for you.

A. My father and one of my brothers came to the police station.

Q. What is the name of that brother of yours?

A. Ebenezer Afatsawo.

Q. What is the relationship between you and Ebenezer Afatsawo?

A. I had known Ebenezer Afatsawo as a friend and brother in the neighbourhood. Later on, he proposed to me which I accepted.

Q. So as at that time prior to the incident, you were in a relationship with Ebenezer Afatsawo?

A. No, it was after the incident.

Q. I suggest to you that prior to the incident; you were staying with your boyfriend.

A. The very day the incident happened, I was at the market but when I closed, I went to Ebenezer's place. Because in my house where I live, it is a lonely place so I went to stay with Ebenezer that day. I wasn't staying with him prior to the incident.

Q. That boyfriend you were staying with is the Ebenezer who stood as surety for you.

A. Yes, he and my father came to the police station.

Appellant through his Counsel submits that PW 3 who claimed that the Appellant is her boyfriend does not know anything about him and also has never visited him in his house. This is what transpired under cross-examination found at page 103 of the ROA.

Q. It is your case that the accused person is your boyfriend.

A. Yes My Lord.

Q. As your boyfriend, you know much about him.

A. He and I have not been together for long so I didn't know so much about him.

Q. So you cannot tell who his parents are.

A. No.

Q. You cannot tell where he comes from.

A. No.

Q. You cannot tell which schools he attended.

A. No

Q. You never visited him in his house before?

A. No

To this Court it is not strange that PW 3 did not have the right answers to questions about Appellant as relationships these days are not what they used to be. People cheat and have side guys and chicks, date online for years without meeting up and have hook-ups as well. The Court is neither scandalized by this lack of knowledge nor judgmental. Had they been a married couple however or engaged it could have been a different angle. PW 3 said the relationship had not been for long.

Appellant's view that PW 3 who denied any knowledge of the Appellant in the presence of the Appellant in the Commander's office later allegedly confessed to the Commander the whole truth, nothing but the truth in the presence of her father and other Police officers. That this alleged confession was not made in the presence of the Appellant thereby denying him the opportunity to challenge her on the spot.

In the opinion of the Court, a reasonable explanation was given for this which Appellant views as an afterthought however. PW 3 explained that she was following Appellant's instruction but later had a change of heart and she came clean to her father and later, to the Police as well.

Section 80 of the Evidence Act, 1975 (NRCD 323) states that

(1) Except as otherwise provided by this Decree, the court or jury may, in determining the credibility of a witness, consider any matter that is relevant to prove or disprove the truthfulness of his testimony at the trial.

(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to the following:

a) the demeanour of the witness:

b) the substance of the testimony;

c) the existence or non-existence of any fact testified to by the witness;

d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;

e) the existence or non-existence of bias, interest or other motive;

f) The character of the witness as to traits of honesty or truthfulness or their opposites

g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

h) the statement of the witness admitting untruthfulness or asserting truthfulness.

Appellant submits that there are other pieces of evidence that disconnect him from the scene and the crime. That PW 1 under cross-examination alleged that the Accused wore white boxer shorts during the commission of the incident but when PW 1 was led by the Prosecution to the Accused person's room, PW 1 could not find the white boxer shorts. That this was also admitted by PW 4 under cross-examination at page 94 of the ROA.

Q. Before you went to the police station (it is rather his room), the accused was under detention from the day of his arrest.

A. Yes

Q. When he went to his room, he told the police he did not have any white boxer shorts. Do you remember that?

A. Yes, that is what he said.

Q. When the police searched his clothing, they did not find any white boxer shorts.

A. Yes

This is what also transpired between PW 4 and Defence Counsel at pages 121 and 122 of the ROA.

Q. Prior to the visit to the accused person's house, he was in detention. Is that not so?

A. Yes My Lord.

Q. Accused person had no opportunity of hiding any of his boxer shorts anywhere. I put it to you.

A. The incident occurred and a day after the incident a case was made before the accused person was arrested. So the accused person was not arrested the same day of the incident.

In the candid and considered opinion of the Court, the testimony that Accused was not arrested the same day of the incident speaks for itself.

PW 1 also testified that the accused pushed her from behind onto the bed and she started shouting and he picked a piece of cloth near the fertilizer bag and tied her mouth with it. When PW 4, PW1 and the Appellant went to the scene of the alleged crime, PW 1 could not find the cloth used by the Appellant to cover the mouth of PW1. As the Court has indicated, that Appellant was not arrested the same day speaks for itself.

Counsel seeks to demonstrate some inconsistencies in whether it was a note book, books or pre-technical books that were sent to the room. Coming from a pre-adult the Court does not find this significant. Also as to whether Appellant fully removed his trousers or

partially removed it, that expression can be lost in translation if being translated from vernacular to English so it is also not significant to the Court. On the issue of when the grandmother noted the irregular walking whether in the market or the home as narrated by PW 1 and PW 2 that is also not a deal breaker as each of them are entitled to their opinion as to when they perceived this. Also as to the time that PW 1 said she got home and when PW 2 said she got home which spans 3.30 pm on one hand as told by PW 1and 4 to 5pm on the other hand as told by PW 2, the way Ghanaians famous (not in a good way) for how we perceive time is also noteworthy.

According to Appellant, another issue to be addressed is the timing of the alleged incident. The particulars of the Charge Sheet indicated that on 27th February, 2020 at about 3:00 pm the Appellant did unlawfully carnally know PW 1. Accompanying the charge, the Facts also stated that at about 3.00 pm Appellant invited the victim through a witness and asked her to send his note book to his house. The Accused person however denied same in his statement. Prosecution in the view of Appellant must prove that as at the time the alleged crime was committed the Appellant was at the scene of the crime at that particular time.

The evidence on record seems to suggest that the Appellant was one of the teachers who was supervising the students during the 6th March rehearsals which ended at 3:00 pm. PW 4 under cross-examination that mentioned the alibi witnesses (Patience Akpene Akoto, Stephen Apisawu, Tome Mawunya and Ayedzi David) she investigated who gave statements to her which is on record. Appellant will be best served to put his side of the story across even if he is of the view that PW 1's testimony remains uncorroborated.

In any case, corroboration may or may not be needed for arriving at a decision in sexual offences such as rape, defilement, indecent assault and child witnesses, albeit some corroborative evidence to support the evidence of the complainant is helpful. In the case

of **ASANTE VS REPUBLIC [2017] SC UNREPORTED CRIMINAL APPEAL NO. J3/7/2013**, it was held per Akamba JSC that;

> ***"It is pertinent at this stage to discuss corroboration in relation to proof in criminal trials in general and sexual offences in particular. We shall thereafter examine the evidence to see if, in the absence of the pregnancy, the testimony of the victim was corroborated in the legal sense. There has never been a general rule in this country that a court in a criminal trial cannot convict an accused person on only the testimony of one witness if that is found to be credible and the evidence of the accused does not raise a reasonable doubt as to his guilt. See REPUBLIC V ASAFU-ADJEI (NO. 2) 1968 GLR 567 CA****. However, before NRCD 323 came into force in 1979, the English rules of evidence which were applicable in Ghana required that in trials for sexual offences the judge must direct himself and the jury that corroboration of the victim's evidence was eminently desirable in order to convict an accused person. See the case of* ***Reekie v. The Queen (1952) 14 WACA 501****. Rationale for this rule was given in English case of* ***R. v Henry and Manning (1969) 53 Crim App 150*** *where Salmon L.J said as follows at page 153 of the Report:*
>
> "What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all."

I hasten to remind myself that the pre NRCD 323 era and the English case mentioned is not the position in our jurisdiction now. With all due deference to Defence Counsel, corroboration is no longer a requirement of law in the absence of which the decision of

the trial court will be reserved. The case of **REPUBLIC VRS MUNKAILA [1996-97] SCGLR 445** and section 7(3) of the Evidence Act spells out this fact. Where no rule of law or practice required corroboration, the test is whether the evidence, though given by a single witness was entitled to credibility. The court could now act on uncorroborated evidence of a single witness since judicial decisions depend upon intelligence and credibility and not on the multiplicity of witnesses produced at the trial. See **ERIC ASANTE VRS THE REPUBLIC [2017] 109 GMJ 1 SC; REPUBLIC VRS ASAFU-ADJAYE (NO.2) [1968] GLR 567 CA.** In sexual offences, it is very rare to get a third party eye witness though it is possible. This is normal since the act is usually done in secret.

Appellant makes a big deal that neither the student who was sent to call her or the Motor rider was called to testify. That should be his closing argument at the end of the case as matters inuring to his benefit in the candid and considered opinion of the Court.

The duty of the Prosecution at this stage of the trial, as per **S.A Brobbey in the Essentials of the Ghana Law of evidence at page 55;** is that;

"The law is well-settled that at the end of the case for the prosecution, only a prima facie case can be made against the accused. This principle was well articulated in the case of The State v. Sowah and Essel (1961) GLR 743) where it was held at page 745 that:

"It is wrong therefore to presume the guilt of an accused merely from the facts proved by the prosecution. The case for the prosecution provides prima facie evidence from which the guilt of the accused may be presumed, and which therefore calls for an explanation by the accused."

The standard required by the law at this stage of the trial, that is, at the end of the Prosecution's case is not as high as that which is required at the end of the full trial. The direction from the Supreme Court in the cases cited above is that the time the

Prosecution concludes presentation of the evidence of the Republic, is not the time to analyze the various ingredients of the offence and determine whether evidence has been tendered to prove them beyond reasonable doubt. The threshold for guilt, being proof beyond reasonable doubt, must be the subject of the trial court's evaluation only at the end of the suit and at the time for writing a judgment. The duty of the court at the end of the Prosecution's case is to determine and act on the import of the evidence, not its positive weight. The trial court is only bound to determine the weight to attach to such evidence at the end of the trial when the defence has also presented its case and the trial judge is called upon to determine whether Prosecution has proved its case beyond reasonable doubt.

Thus the duty of the trial Court at the end of Prosecution's case is to determine and act on the import of the evidence and not its positive weight. This Court does not agree with Appellant that the Learned Trial Judge ignored all the evidence on record in his Ruling dated 22nd April, 2022 or that he failed to properly and adequately analyze the evidence on record before coming up with his Ruling. The Ruling of the trial Circuit Court, Sogakope cannot be faulted by this Court. On the Contrary this Court finds that the Prosecution made a prima face case against the Appellant that will warrant the Appellant to open his defence as ordered by the trial court.

In the case of **MALI V. THE STATE [1965] GLR 710-715** the Supreme Court held that: "Where at the end of the prosecution's case, the court requires further evidence to enable it decide issues raised in the evidence given by the prosecution, then the irresistible inference is that the prosecution has not made out a case and the accused should be acquitted."

In the case of **SARPONG v. THE REPUBLIC [1981] GL 790-801** held that: "the law enjoined a trial judge to hold that no prima facie case had been made and that the accused

was entitled to be acquitted and discharged if at the close of the prosecution's case, no sufficient evidence had been adduced to prove beyond all reasonable doubt, the charge laid against the accused; and it was wrong in law for the trial judge to ignore that legal duty and instead call upon the appellant to enter his defence".

From the record, evaluation of the law on submission of no case and the evidence presented by the Prosecution however, it is premature to state that no court would convict the Appellant on such evidence. The Court cannot agree with Appellant that the Prosecution failed to lead any evidence to prove the essential elements or ingredients of the offence leveled against him. In any case at that point all that is required is a prima facie case.

This Court will therefore have to decline the invitation presented in this Appeal to set aside the Ruling of the Trial Court. The Court in consequence dismisses the Appeal and Orders the Appellant to return to the lower Court to open his Defence forthwith. The Registrar of the Court is to serve the Order on the Court below and Attorney-General's Office for their information and compliance.

[SGD]

H/L JUSTIC DOREEN G. BOAKYE-AGYEI MRS. ESQ.

JUSTICE OF THE HIGH COURT

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